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Supreme Court, U.S.
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No. 03-1334

In The Supreme Court of the United States

IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT,

Petitioner,

v.

SIERRA CLUB,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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May 21, 2004

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QUESTIONS PRESENTED

1. Whether the court of appeals properly ruled, based on the specific record before it and applying the standards of review established by this Court, that EPA acted arbitrarily and capriciously in waiving reclassification of Imperial Valley to "serious" nonattainment for particulate pollution.

2. Whether the court of appeals properly directed EPA to reclassify Imperial Valley to "serious" nonattainment on remand, where the Clean Air Act expressly mandated such reclassification absent a valid waiver, the reclassification was already more than eight years overdue, and the record did not support further consideration of a waiver on remand.

DISCLOSURE STATEMENT

Sierra Club has no parent companies, and there are no publicly-held companies owning any stock in Sierra Club. Sierra Club is a national nonprofit organization incorporated in California and dedicated to the protection and enjoyment of the environment.

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COUNTERSTATEMENT

The Imperial Valley Planning Area (Imperial Valley) has long violated federal health standards for airborne particulate matter (PM-10), a form of pollution linked to premature deaths and other severe health impacts. 40 C.F.R. § 81.305 (2003 and prior versions); 66 Fed. Reg. 5002, 5018, 5021 (2001). When Imperial Valley failed to attain the PM-10 standards by 1994, the Clean Air Act (the Act) mandated that the area be reclassified from "moderate" to "serious" nonattainment for PM-10, a step that would trigger stronger pollution control requirements. 42 U.S.C. § 7513(b)(2), (c)(1); Appendix to Petition for Writ of Certiorari (Pet. App.) 66a. Section 179B(d) of the Act allowed EPA to waive reclassification only if the state showed that the area would have timely attained standards "but for" emissions from outside the United States. 42 U.S.C. § 7509a(d). Thus, to meet the test, the state had to show that each and every violation in Imperial Valley as of the attainment deadline would not have occurred but for foreign emissions – in this case emissions from Mexico to the south. Pet. App. 11a-12a.

Here, the court of appeals found that EPA acted arbitrarily and capriciously in waiving reclassification of Imperial Valley under § 179B(d), when the record showed that PM-10 violations occurred in Imperial Valley even when there was no evidence of pollution transport from Mexico. Undisputed evidence in the record showed that violations occurred at Brawley, more than 20 miles north of the border, on days when the air was stagnant, when what little wind there was came predominantly from the west, when PM-10 levels were actually lower at locations closer to border, and when there was no evidence whatsoever of any actual transport of pollution from Mexico. Pet.

App. 10a-13a, 53a-55a. Although there were very slight west-southwesterly winds for parts of these days, the only source of Mexican emissions identified by EPA – the city of Mexicali – is south-southeast of Brawley, not west-southwest. Pet. App. 10a-13a.

The court of appeals expressly acknowledged that it owed "significant" deference to EPA's technical judgment (Pet. App. 9a), but concluded, after carefully reviewing the record (including the wind data cited by Petitioner), that the agency's finding of "but for" causation on these days ran counter to the evidence in the record. Pet. App. 9a-13a. The court therefore found that EPA's action was arbitrary and capricious under well-settled standards of review established by this Court. *Id.*, *citing, inter alia, Motor Vehicle Mfrs Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious where based on "clear error of judgment" or an explanation that "runs counter to the evidence before the agency"), and *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972) (courts do not defer to agency decision that "is without substantial basis in fact").

Given that the record simply did not support a finding that Mexican emissions caused all of the violations in Imperial Valley, the court vacated EPA's action and remanded with instructions for EPA to reclassify the area from "moderate" to "serious" as expressly mandated by the Act. Pet. App. 13a-14a. The court found that no useful purpose would be served by yet another round of administrative proceedings because the record was already fully developed and the conclusions that must follow from it were clear. *Id.* Earlier in its opinion, the court had noted the long history of delay in implementing the Act's requirements in Imperial Valley. *Id.* 6a. At the time of the

court's remand order, reclassification of Imperial Valley to "serious" was already more than eight years overdue. 42 U.S.C. §§ 7513(b)(2), (c)(1). The agency had taken no action when the area missed its 1994 attainment deadline, and only acted in 2001 after being sued by Sierra Club. Pet. App. 6a-7a. The consent decree entered in that suit required EPA to make a reclassification determination for Imperial Valley by October 9, 2001, unless EPA granted a § 179B waiver by then (or took other action not relevant here). ER 165.[1] At the time it proposed to grant the § 179B waiver for Imperial Valley, EPA itself specifically proposed in the alternative to reclassify the area to "serious" if it was determined that the State had not made an adequate § 179B demonstration. Pet. App. 20a-21a.

EPA did not petition for rehearing in the court of appeals, and has not petitioned this Court for a writ of certiorari in this case.

REASONS FOR DENYING THE PETITION

The court of appeals correctly stated and applied well-settled principles of administrative law in finding that EPA's waiver decision here was arbitrary and capricious. The court expressly recognized its duty to give significant deference to EPA technical judgments while also ensuring that the agency's decision had a "substantial basis in fact" and did not run "counter to the evidence." Petitioner's disagreement with the court of appeals' application of

[1] "ER" refers to Petitioner's Excerpts of Record in the Ninth Circuit.

these principles to the specific facts at issue here is unsupported by the record, and in any event does not present a matter warranting this Court's attention. Sup. Ct. R. 10 (certiorari "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Likewise, the court of appeals' remand instructions were fully justified by the record and circumstances of this case, and were consistent both with this Court's precedent and remand instructions issued by other circuits.

I. THE COURT OF APPEALS CORRECTLY HELD THAT EPA'S WAIVER ACTION WAS ARBITRARY AND CAPRICIOUS

Contrary to Petitioner's claims, the court of appeals was fully cognizant of its duty to give substantial deference to EPA's technical judgment. At the very outset of its analysis, the court expressly "recognize[d] that where, as here, a court reviews an agency action 'involving primarily issues of fact,' and where 'analysis of the relevant documents requires a high level of technical expertise,' we must 'defer to the informed discretion of the responsible federal agencies.'" Pet. App. 9a, *quoting Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989). The court further acknowledged that "'a reviewing court must generally be at its most deferential'" when examining an agency's scientific determinations. Pet. App. 9a, *quoting Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). The court of appeals also recognized, however, that an agency decision must still have a "'substantial basis in fact,'" and that a reviewing court is obliged to "'consider whether the [agency] decision was based on a consideration of the relevant factors and

whether there has been a clear error of judgment.'" Pet. App. 9a, *quoting Federal Power Comm'n*, 404 U.S. at 463, and *State Farm*, 463 U.S. at 43. The court also noted that, under this Court's precedent, an agency action is arbitrary and capricious where its rationale "'runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Pet. App. 10a, *quoting State Farm*, 463 U.S. at 43. Petitioner does not and cannot claim that the court of appeals misstated these well-settled principles of administrative law, all of which come directly from decisions of this Court.

The court of appeals properly applied these principles in holding that EPA's waiver decision was arbitrary and capricious. The court carefully reviewed the record and concluded that EPA's finding of "but for" causation simply ran "counter to the evidence" and was "so implausible" that it could not withstand scrutiny. EPA's theory was that all PM-10 violations in Imperial Valley were caused by PM-10 pollution blown into Imperial Valley from Mexicali, Mexico. Pet. App. 27a-28a. The undisputed data in the record showed, however, that on at least two days when significant PM-10 violations occurred at Brawley (21 miles north-northwest of Mexicali), the air was stagnant, and what little wind there was came predominantly from the west or west-southwest. Pet. App. 10a-13a, 53a-55a. EPA did not and could not explain how such west or west-southwesterly winds could conceivably carry PM-10 north-northwest from Mexicali to Brawley. Moreover, the data for these days showed *higher* PM-10 levels at Brawley than at points south (closer to Mexicali), which under EPA's own theory refuted the premise of transport from

Mexico. Pet. App. 10a-11a, 27a; ER 34. EPA was completely unable to reconcile the theory of "but for" causation with all of the foregoing, although the court gave the agency multiple opportunities to do so – at oral argument, and again by allowing the filing of supplemental briefs.[2] Pet. App. 11a. Nor was EPA able to quantify the transport of any PM-10 from Mexico to Imperial Valley at any time. Pet. App. 78a.

The court of appeals thus correctly concluded that EPA's decision could not withstand even a highly deferential standard of review. This was not a matter of the court conducting a de novo review or substituting its judgment for the agency's, but of the agency being unable to offer a plausible rationale that could reconcile the record with a finding of "but for" causation.

Contrary to Petitioner's assertion, the court did in fact consider EPA's other stated bases for decision (Pet. App. 6a-8a), as well as the agency's § 179B guidance document (which by its terms was "preliminary" and nonbinding, Pet. App. 93a). Pet. App. 4a-6a. It was undisputed, however, that to qualify for a § 179B waiver, the state had to show that *none* of the violations in Imperial Valley would have occurred but for emissions from Mexico. *Id.* 11a-12a. Having properly determined that the record simply did not support such a showing for the two specific violation days

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[2] Petitioner complains that the court did not consider certain rainfall data, but EPA itself never deemed that evidence relevant or probative, and it is on the agency's rationale that EPA's action must stand or fall. *State Farm*, 463 U.S. at 50.

in Brawley, there was simply no need for the court to conduct an in-depth review of data for other days.

II. THE COURT OF APPEALS' REMAND INSTRUCTIONS WERE PROPER

Although the normal course of action when the record fails to support an agency's decision is to remand for additional investigation or explanation, this Court's precedent acknowledges the propriety of remanding with instructions in exceptional cases. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Citing that precedent, the court of appeals properly found that this was one of those special cases warranting remand instructions. The record was already fully developed, and EPA had been unable to offer any plausible explanation of that record that would justify a waiver of reclassification. This was not a situation where remand for further deliberations might serve some useful purpose. To the contrary, EPA took that position that the state had already offered its best possible case for a waiver given available information, and that it was "not now possible" to create additional information from new studies. Pet. App. 76a-77a.

Moreover, at the time of the court's decision, reclassification of Imperial Valley to "serious" as mandated by the Act was already more than *eight years* overdue. 42 U.S.C. § 7513(b)(2). The District Court had previously ordered EPA to take reclassification action for the area by October 2001 absent a § 179B(d) waiver. EPA *itself* had expressly proposed reclassification as the alternative to such a waiver. Pet. App. 20a-21a. Indeed, where an area has missed its attainment deadline, the Act requires reclassification "by operation of law" – it is not a matter for EPA

discretion. 42 U.S.C. § 7513(b)(2)(A). Given this unique statutory and procedural context, and the history of extraordinary EPA delay, the court was fully justified in instructing EPA to proceed with the already long-overdue reclassification.[3] A remand for yet another round of waiver deliberations would have served only to further nullify the Act's precise timetables and requirements for remedying PM-10 pollution in Imperial Valley. *See Whitman v. American Trucking Ass'ns,* 531 U.S. 457, 481-86 (2001) (stressing importance of adherence to express antipollution mandates in 42 U.S.C. §§ 7511-7511f [which encompass the PM-10 deadlines and reclassification requirements]).

Contrary to Petitioner's claims, reclassification to "serious" will not impose unusual or undue burdens on Imperial Valley, but rather will simply require the area to adopt the same level of pollution control *already* required in a number of communities that have long been classified as "serious" for PM-10. These include the Coachella Valley (immediately north of Imperial Valley), Los Angeles, the San Joaquin Valley, Reno, and Phoenix. 40 C.F.R. §§ 81.303, .305, .329 (2003). Moreover, § 179B(d) is not the only avenue of relief for border areas impacted by foreign pollution. Section 188(e) of the Act allows EPA to extend the attainment deadline for "serious" PM-10 areas based on consideration of a variety of factors, including impacts

[3] This case is therefore readily distinguishable from *INS v. Ventura*, 537 U.S. 12 (2002), a case where the circuit court's remand order relied on a new theory not previously considered by the agency, and where both sides agreed that further deliberations were needed on remand. Nor is there any claim here of recurring error in the scope of Ninth Circuit remand orders to EPA – as was claimed in *Ventura* with respect to INS cases. 537 U.S. at 16.

from transboundary pollution, without requiring a showing of "but for" causation. 42 U.S.C. § 7513(e).

III. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS

There is no conflict among the circuits that would militate in favor of granting certiorari in this matter. The administrative law principles stated and applied by the Ninth Circuit match those regularly used in all circuits. Moreover, the level of scrutiny given by the Ninth Circuit to EPA's action here is consistent with that applied in other circuits.[4] Similarly, the Ninth Circuit's statement of

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[4] *E.g.*, *Public Citizen v. Mineta*, 340 F.3d 39 (2d Cir. 2003) (holding arbitrary and capricious DOT rejection of more protective tire monitoring systems for new cars); *Hill v. Boy*, 144 F.3d 1446 (11th Cir. 1998) (reversing agency finding where record did not support it); *Chemical Mfrs Ass'n v. EPA*, 28 F.3d 1259 (D.C. Cir. 1994) (overturning EPA listing of pollutant as "high risk" based on a model that the court found unsupportive); *Monsanto Co. v. EPA*, 19 F.3d 1201 (7th Cir. 1994) (reversing EPA decision that was based on technical conclusions not supported by the record); *Bell Petroleum Svcs. v. Sequa Corp.*, 3 F.3d 889, 904-06 (5th Cir. 1993) (holding that record did not support EPA decision to furnish alternative drinking water supply to Superfund site); *United States v. F/V Alice Amanda*, 987 F.2d 1078 (4th Cir. 1993) (holding arbitrary and capricious fishery agency finding that was "clearly at variance with established facts"); *Rocky Mountain Helicopters v. FAA*, 975 F.2d 736 (10th Cir. 1992) (reversing FAA safety requirement that record showed was unnecessary); *Audubon Society of Central Arkansas v. Dailey*, 977 F.2d 428 (8th Cir. 1992) (agency action reversed where record "gave every reason to doubt" agency's finding); *Ohio v. EPA*, 784 F.2d 224 (6th Cir. 1986) (holding EPA reliance on unvalidated model to be arbitrary and capricious); *NRDC v. EPA*, 790 F.2d 289, 305-306 (3d Cir. 1986) (rejecting EPA technical rationale that ran counter to the evidence before the agency); *Sierra Club v. Marsh*,

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the law governing remand instructions can hardly create a conflict with other circuits, as it comes directly from this Court's precedent. Pet. App. 13a, *quoting Florida Power & Light*, 470 U.S. at 744. The decision on whether a particular case warrants broader than usual remand instructions is necessarily a fact-specific one, but the Ninth Circuit's remand instructions in this case are well within the range of those issued by other circuits.[5] Indeed, the Seventh Circuit recently entered a virtually identical remand order in *Sierra Club v. EPA*, 311 F.3d 853, 862 (7th Cir. 2002) (remanding to EPA with instructions to immediately reclassify St. Louis as a "serious" nonattainment area).

IV. NO OTHER FACTORS MAKE THIS CASE WORTHY OF THE COURT'S ATTENTION

This case does not present any other issues of federal law warranting this Court's review. Rather, Petitioner merely raises a highly fact-specific disagreement with the court of appeals' conclusion that, on the particular record before it, EPA's action was arbitrary and capricious. Nor

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769 F.2d 868 (1st Cir. 1985) (record refuted agency's finding that project would have no significant impact on the environment).

[5] *E.g.*, *Natural Resources Defense Council v. Reilly*, 983 F.2d 259, 261 (D.C. Cir. 1993) (in addition to vacating unlawful EPA decision not to regulate, court ordered promulgation of regulations); *Audubon Soc'y*, 977 F.2d at 436-37 (agency directed to prepare environmental impact statement on remand); *Marsh*, 769 F.2d at 882 (same); *Connecticut Fund for the Environment v. EPA*, 672 F.2d 998, 1009 n.24, 1014 (2d Cir. 1982) (directing EPA to issue revised order to reimpose construction ban on remand); *Natural Resources Defense Council v. EPA*, 478 F.2d 875, 888-91 (1st Cir. 1973) (directing EPA on remand to promulgate federal clean air plans).

does this case implicate any other matters of pressing or substantial concern warranting this Court's attention.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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